Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 286.

JOHN M. WARD, APPELLANT,

vs.

MOSES H. SHERMAN AND DAVID HARDENBERG.

PLEADINGS.

The character of this case, as disclosed by the pleadings, is, substantially, as follows:

1. Complaint was filed, November 28, 1894, in the district court, Maricopa county, Arizona, by John M. Ward, (of Oroville, California,) as plaintiff, against the above-named Sherman and Hardenberg, (of Maricopa county, Arizona,) as defendants; alleging, that said Hardenberg made and delivered to plaintiff his promissory note, dated August 23, 1889, at Phœnix, Arizona, for $12,500, payable on or before October 1, 1894, with interest from August 1, 1889, until paid at 8 per cent. per annum; that said Sherman, for a valuable consideration, indorsed upon said note a guaranty of its payment; that there was due on said note the sum of $1,500; for which amount, judgment was prayed, (*R.*, *2–4*).

Plaintiff also filed affidavit on attachment, setting forth the facts above recited, and, further, that the amount so claimed is a *balance* due on said note, and that its payment "is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property" (*R.*, *4*).

2. Summons issued upon the date of filing complaint, November 28, 1894, (*R.*, *3*;) but, not having been served, further process issued against defendants May 6, 1899, (about four years and five months after filing said suit,) resulting in service upon Sherman, on said last-named date, and a return of "not found" as to Hardenberg, (*R.*, *12*). The latter was never served, and did not appear in the case, (*R.*, *27*).

3. Sherman filed answer and counter-claim, praying that plaintiff be decreed to be a mortgagee in possession of certain real and personal property, (therein described); that an accounting be had; that defendant be allowed to redeem, etc.; as will more fully appear by reference to said answer and counter-claim, and the exhibits of record, filed as part of the pleadings and proceedings of record, prior to the trial of the cause (*R.*, *5–11*; *18–20*).

(The exact character of the defense and prayer for *affirmative* relief, set up in said answer and counter-claim, so called, will be more fully referred to in the further discussion of the case.)

4. The cause came on for trial, November 14, 1899, before the court, sitting without a jury; testimony was introduced on behalf of plaintiff and defendant Sherman, (*R.*, *40–84*); thereafter, December 2, 1899, the court filed its findings of fact and conclusions of law, (*R.*, *27–30*); and, on the same day, entered judgment, upon said findings and conclusions, in favor of defendant Sherman and against plaintiff; in

which judgment, said defendant, under said counter-claim, was awarded possession, as owner, of certain real estate, of large value, together with certain cattle and personal property thereon, and, in addition, a money judgment against plaintiff in the sum of $17,173.50, with interest from date at 7 per cent., together with costs, etc., (*R., 25–26*).

5. Plaintiff moved for a new trial; the same was overruled, December 30, 1899; and, thereupon, plaintiff, in open court, prayed an appeal from said judgment in its entirety, with *supersedeas* (as to so much of said judgment as decreed the payment by plaintiff of $17,173.50), to the supreme court of the Territory; which motion was granted and *supersedeas* bond given, as above, and the appeal perfected, (*R., 35–36; 38–39*).

6. The supreme court of the Territory *affirmed* the judgment of the lower court, March 21, 1901, (*R., 96–97;* Opinion, *R., 88–89*); and, thereupon, the case was brought to this court, on appeal, with *supersedeas* (*R., 94, 98*).

STATEMENT.

In order to a proper understanding of the case, it is important to carefully consider the facts involved. With those facts established, there should be but little difficulty in correctly applying the law.

The facts, in the main, are not seriously controverted, and are, as follows:

1. On August 23, 1889, Ward, then and for many years prior thereto *owner* of a cattle range in Maricopa county, Arizona, known as the "Sunflower," together with certain cattle and stock thereon, implements, etc., sold the same to said Hardenberg, for $34,500; of which amount $9,500 was subsequently paid in cash, and the balance, namely, $25,000,

was represented by two promissory notes, each, dated as aforesaid, for the sum of $12,500, one payable on or before October 1, 1894, and the other on or before October 1, 1897, with interest from October 1, 1889, until paid, at the rate of 8 per cent. per annum. Each note was signed by Hardenberg as maker, and the payment guaranteed by the above-named Sherman, by indorsement on the back of each thereof (*R., 18, 20, 69, etc.*).

2. On the same date, and as part of the transaction, Hardenberg made, executed, and delivered to Ward a mortgage upon said real and personal property, to secure the payment of the two notes above described, representing the balance of purchase-money, as above (*R., 8–11*).

3. Subsequently, Sherman and Hardenberg organized a corporation, under the laws of Arizona, under the name "The Sherman-Hardenberg Cattle Company;" Sherman and Hardenberg being the only stockholders therein; and, thereupon, Hardenberg conveyed all of the property aforesaid, subject to said mortgage, to said Cattle Company (*R., 63–64*).

4. The interest on the above notes was paid up to October 1, 1893 (*R., 4, 18, 48, 63*).

It is claimed by Sherman that he personally furnished the moneys to Hardenberg to make said interest payments, amounting, in all, to $8,000, (*R., 63*); but this fact is not important, inasmuch as Sherman guaranteed the payment thereof, as above, (*R., 4, 18*).

5. It appears that the Cattle Company lost money in its venture; and, in September, 1894, the first of said two notes, as well one year's interest on both notes, being about to fall due, (October 1, 1894), Sherman and Hardenberg sent the

secretary of the company, (C. F. Ainsworth), to see Ward, at Oroville, California, for the purpose of effecting, if possible, an amicable adjustment and settlement of said indebtedness.

In that conference said secretary advised Ward that the company could not pay the money; that Sherman wanted to rid himself of the whole thing, as did the company; that they had all lost money in it and "wanted to quit;" and, accordingly, it was proposed to Ward that he take back all the property the company had (*R., 70, 82, 83*).

6. Said negotiation resulted in articles of agreement, entered into September 12, 1894, between Ward and the Cattle Company, the latter acting therein by Sherman as president thereof, as shown by the signature to said agreement (*R., 20, 86*).

Attention is particularly asked to this fact, as one of importance in the light of subsequent events and of the effort made by Sherman, in this case, to ignore said agreement, which he had personally signed, as above.

By the terms of that agreement, it was provided, that the Cattle Company should, within thirty days from the date thereof, transfer, convey and deliver, by proper deeds of conveyance and bills of sale, *all* of the real and personal property, so theretofore purchased from Ward by Hardenberg, as hereinabove described; as well, also, all other real and personal property owned by said Cattle Company, in Arizona, including, particularly, the cattle, stock and implements thereon, excepting therefrom only such cattle as had been *sold and delivered* by the Cattle company *prior* to September 1, 1894; all stock and cattle sold subsequent to said last-named date to be accounted for by said Cattle Company to Ward.

And, in consideration that the Cattle Company convey and deliver, within the period, as above, Ward agreed to deliver to Hardenberg and Sherman the two promissory notes afore-

said, and to release said individuals from the payment of all interest due thereon, as well, also, to cancel and discharge the mortgage theretofore executed by Hardenberg to Ward, as above (*R., 18–20; 85–86*).

7. The Cattle Company, by letter from its secretary, addressed to Ward, dated September 29, 1894, authorized the latter to enter upon and take possession of all its said property, "in accordance with and as described in" the agreement aforesaid (*R., 22*); and, thereupon, Ward took possession thereof, as so thereunto lawfully authorized (*R., 22, 49, 71, 82*).

The Cattle Company executed a bill of sale to Ward, covering certain personal property not embraced in the original mortgage, known as Desert Wells (*R., 21, 83*).

It appears, however, that the company did not transfer and convey to Ward the title to said real estate, as it had agreed to do, in the settlement, above mentioned, nor the live stock and other personal property therein described, nor did it deliver, or account to him for, certain of the stock cattle, as hereinafter stated (*R., 8, 19, 26, 28–29, 64*).

8. Under the terms of said agreement, Ward was entitled to an accounting for all stock sold and delivered by the Cattle Company, subsequent to September 1, 1894. It developed, however (as claimed by Ward), that 104 head of cattle to which he was entitled, under said agreement, had been sold from the range by Hardenberg, about the middle of September, 1894; without accounting therefor (*R., 72–80*).

Upon learning of said fact, Ward brought the matter to the attention of Hardenberg, who admitted it (*R., 72*), and likewise to the attention of said secretary of the company; and Ward, accordingly, made demand for settlement for said cattle, although without result (*R., 81–82*).

9. Under these facts, and having gone into lawful possession of the property, as owner, under the arrangement above referred to, but being unable to obtain any settlement from the company for the value of said cattle, Ward brought suit, November 28, 1894, upon one of said notes, against Hardenberg, as maker, and against Sherman, as guarantor, seeking to recover, not the principal nor interest, but an unsecured *balance* of $1,500 claimed to be due thereon (*R., 1, 4*); and this upon the theory that the transaction and agreement above mentioned adjusted and settled the matters between said parties to the extent said agreement had been carried out and performed by the Cattle Company, but not settled as to the value of said 104 head of cattle, which Ward estimated at $1,500, as above, and for which amount he brought suit (*R., 1, 40–42, 73*).

In this connection, and as showing that there was no abandonment or rescission of the agreement of settlement by Ward, attention is called to the affidavit on attachment, in which Ward set forth that the amount claimed "*is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property*" (*R., 4*).

10. This suit was filed November 28, 1894 (*R., 1*), but service was not had upon Sherman until May 6, 1899 (*R., 12*), and was never had upon Hardenberg, nor did the latter appear in the action (*R., 12, 25*). During said period, covering nearly five years, Ward continued in the full and undisputed ownership and possession of said cattle range and property solely under the agreement aforesaid, and exercised full and complete rights of ownership in respect thereof, without notice or claim of any kind or character whatsoever, of any adverse title on the part of any one.

11. Having been served with process, as above, defendant Sherman filed answer and counter-claim, (so called,) May 16, 1899, in which were set forth, in substance, the foregoing

facts; but, in addition thereto, it was alleged that, notwithstanding said agreement of settlement, plaintiff had failed to carry out his part thereof, in that he had refused and neglected to satisfy and discharge the said two promissory notes and mortgage, but, on the contrary, had brought suit on one of such notes; that, upon an accounting, it would appear that plaintiff had sold sufficient cattle and property to satisfy and discharge, in full, said notes and mortgage; that, by transfer from Hardenberg and the Cattle Company, defendant Sherman was, at the time of the commencement of the action, as well at the time of making said answer, the only equitable owner of the right of redemption of said property; and, accordingly, prayed judgment for an accounting by plaintiff, and, further, that said defendant be allowed to redeem said mortgaged property, etc., (*R., 5–11*).

12. Under this unusual state of pleadings, namely, a suit on an ordinary money demand, and a counter-claim thereto, praying an accounting from plaintiff, as a mortgagee in possession of real estate, and also praying the right to redeem said real estate; the case came on for trial before the court (Hon. Webster Street), sitting without a jury, November 14, 1899 (*R., 25–30*).

The court, by its findings, conclusions, and judgment, entirely set aside the agreement by which plaintiff went into lawful possession of the property, in September, 1894, which it characterized as a mere *attempted* settlement, not carried out by plaintiff; and, notwithstanding plaintiff had been permitted to remain in undisputed possession of the property as *owner* for a period of almost five years, the court permitted the character of that possession to be changed to that of a mere mortgagee in possession, or "trustee for the benefit of defendant Sherman," and, as such, accountable for cattle sold therefrom by Ward while in possession (*R., 28–29*).

No such accounting, however, was in fact had; the court

itself having stated the account, at the trial, with no showing before it other than a certain paper-writing, which had been secured from plaintiff, in April, 1899, by an alleged prospective purchaser of the property; in which statement it was set forth, that, during certain years, (named,) Ward had sold a certain number of cattle, at a stated price, and that his expenses for running the ranch, during the same years, had amounted to a certain named sum.

This informal statement, not under oath, not made in court, but secured from plaintiff by a supposed purchaser, was taken by the trial court as conclusive, and an account stated against plaintiff, based entirely upon the figures therein named, (*R.*, *22–23*).

Thus it was that judgment was rendered against plaintiff, and in favor of defendant Sherman, by which the latter was awarded the possession, as owner, of valuable real estate, and a money judgment against plaintiff in the sum of $17,173.50 (*R.*, *26*).

13. Motion for new trial was made and overruled; and, thereupon, plaintiff appealed to the supreme court of the Territory, and assigned as errors, the admission and rejection of evidence; that the evidence did not sustain the findings and judgment of the court; and that such judgment was contrary to the evidence and contrary to law (*R.*, *24*).

14. The supreme court of the Territory had before it the findings of fact and judgment of the court below, as well, also, transcript of the testimony taken in the case, transcribed and certified by the court reporter, as authorized by the laws of the Territory; but, without going into the merits of the controversy, the court held that the assignment of errors was general and indefinite, and not sufficiently specific to be entitled to consideration; and, finally, that "*no error appearing upon the face of the record*," proceeded to *affirm* the judgment below, (*R.*, *88–90*; *98–100*).

And thus the case was brought to this court on appeal.

ASSIGNMENT OF ERRORS.

I.

The supreme court of Arizona erred, in holding that the errors assigned before that court were general, indefinite and not sufficiently specific; whereas the errors so assigned (Nos. 3, 4, 5, and 6, *R.*, *88*, *99*) directly averred that, upon the whole evidence, the judgment of the trial court was erroneous both in fact and law. The appeal to that court removed the entire cause thereto, and entitled appellant to the review thereof.

II.

The supreme court of Arizona therefore further erred in refusing and omitting to determine the cause upon the record, under the errors so assigned.

III.

The supreme court of Arizona erred in holding that no error appeared on the face of the record (*R.*, *89*, *100*); whereas, appellant avers, that the following errors did so appear:

IV.

That by the pleadings it affirmatively appears that there was no rescission by plaintiff, Ward, of the agreement of September 12, 1894 (*P. Ex. B.*, *R.*, *18*), whereunder plaintiff took possession of the property and premises covered by the prior mortgage to plaintiff.

V.

That no evidence was offered tending to show any rescission of the agreement under which alone the appellant lawfully entered upon and continued in the rightful possession of the property.

VI.

That no evidence was offered tending to show any title in appellee Sherman, as owner of the alleged equity of redemption.

VII.

That it was error to hold appellant Ward as a mortgagee in possession, when as plainly appears by the pleadings he took possession solely under the agreement aforesaid as absolute owner, and not otherwise.

VIII.

Upon a suit to recover a mere unsecured money demand, it was error to permit the appellee, Sherman, to file counter-claim, asking an accounting and right to redeem real estate from the plaintiff, as mortgagee in possession; and, also, error to enter judgment against plaintiff, and in favor of defendant, under such counter-claim.

IX.

Error to permit no accounting in fact, nor proper opportunity to plaintiff in that behalf, the court itself, without any reference, having stated an account and entered judgment thereon.

X.

That the judgment was not sustained by the record, it appearing therefrom that there was no outstanding equity of redemption which the Cattle Company, as mortgagor, could lawfully transfer to any one, the same having been extinguished by the agreement of September 12, 1894, whereunder and alone the possession of the premises was surrendered to and held by appellant, Ward, as absolute owner; that there was, in fact, no transfer of such extin-

guished equity of redemption to appellee, Sherman; that he was not, in law, entitled to assert any such pretended right as a counter-claim against the appellant's demand, which was an action solely to recover, according to the terms and spirit of said agreement, the amount of balance due thereunder, and upon his express declaration that such demand "*is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property*" (*R.*, *4*).

XI.

That, as disclosed by the pleadings, appellant, Ward, went into lawful possession as owner of the property under the agreement above referred to; that he was under no obligation to cancel and surrender the notes and discharge the mortgage until full performance, or tender thereof, by the Cattle Company; that the counter-claim of defendant made no averment of performance or tender, of those things by the Cattle Company required to be done, before the right to the cancellation, surrender and discharge of notes and mortgage should accrue; and the court erred in entering the judgment herein, which cannot be properly founded on the pleadings.

XII.

That the court erred in finding and holding that plaintiff, Ward, "held said property as a trustee for the benefit of defendant Sherman, and that he is accountable for the property by him sold while in possession to the said defendant Sherman" (*R.*, *29*); whereas the record discloses that there was no legal evidence to establish such fact, or upon which to base such finding or conclusion.

BRIEF.

I.

A mere reading of the foregoing facts will disclose that this case is one of unusual hardship upon plaintiff.

Before considering the questions involved relating more particularly to the merits of the controversy, it may not be improper to refer briefly to the jurisdiction of the court below, and to its practice as applied in this case.

The judicial power of the Territory of Arizona is vested in a supreme court and in inferior courts, as provided by act of Congress, February 24, 1863 (*12 Stats., 664*), which act further provided, that the laws of the Territory of New Mexico, so far as not inconsistent, should be extended to the Territory of Arizona.

The organic act of the Territory of New Mexico, September 9, 1850 (*9 Stats., 446*), provided, *inter alia*, that the Constitution and all laws of the United States, not locally inapplicable, shall have the same force and effect within said Territory as elsewhere within the United States (§ *17*); and, further, that no citizen of the United States shall be deprived of his life, liberty, or property, in said Territory, except by the judgment of his peers and the laws of the land (§ *19*).

Section 1838, Revised Statutes of the United States, provides, that "the supreme court and the district courts, respectively, of every Territory, shall possess chancery as well as common-law jurisdiction."

While, under the earlier decisions of this court, it was held, that claims at law and claims in equity cannot properly be united in one action, even in the territorial courts; yet, such intermingling of legal and equitable remedies in one form of action, finally, received the approval and sanction of this court, in the case of Hornbuckle *vs.* Toombs (*18*

Wall., 648) wherein said earlier decisions, laying down the contrary doctrine, were reconsidered and not approved; and it was held, that the practice, pleadings, forms and modes of procedure of the territorial courts are matters properly within the control of the territorial assemblies; and this doctrine has been adhered to since the decision in the last-named case.

While, therefore, such authority may now be assumed to exist, yet, in the absence of appropriate territorial legislation, it necessarily follows that the distinction between the two classes of remedies, legal and equitable, is recognized and preserved.

An examination of the forms of procedure in the several Territories discloses that, in the main, but one form of civil action is contemplated; and this, likewise, is true in respect of the Territory of Arizona, so far as its practice was governed by the Compiled Laws of 1877, which, in chapter 48, expressly provided, that "there shall be in this Territory but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs," to be commenced by complaint, etc. That provision of law was considered and approved by this court, in the case of Ely *vs.* R. R. Co. (*129 U. S., 291*).

The laws of said Territory were, however, revised, in 1887; and, in said revision, the distinction between actions and proceedings at law and in equity is clearly recognized and preserved (see §§ *601, 610, 893, 2144, 2399, etc.*); and, moreover, by § 3257, of said revision of 1887, chapter 48, of the Laws of 1877 (above referred to), is expressly *repealed*.

That being so, and unless counsel have inadvertently overlooked some provision in said revision of 1887,—the latter being the laws in force at the time of the institution and prosecution of this action,—it results that the distinction between legal and equitable remedies in the Territory of Arizona must be recognized and appropriately enforced.

Furthermore, it should be borne in mind that, under said

Laws of 1887, it is, among other things, provided, that no counter-claim for unliquidated damages may be set off against an action for a liquidated sum, and that no liquidated sum may be set off against an action for unliquidated damages (§ *736*), and that if a suit be founded on a certain demand, the defendant shall not be permitted to set off unliquidated or uncertain damages founded on a tort or breach of covenant on the part of plaintiff (§ *740*); *Provided, however*, That nothing in the preceding section shall be construed to prohibit defendant from pleading in set-off any counter-claim founded on a cause of action arising out of, incident to, or connected with, plaintiff's cause of action (§ *741*).

While, apparently, the right of trial by jury is recognized and preserved under the laws of said Territory, such right is preserved only to a limited extent. Section 109, of said Laws of 1887, requires parties litigant to demand a jury trial at the time of the call of the docket of the court, said demand to be accompanied by a deposit to cover the *per diem* of such jury for one day; and, if such demand be not then made, the right to a trial by jury shall be regarded as waived, and the cause shall be tried by the court, unless, of its own motion, it shall otherwise order.

Having in mind the above provisions of law, the pleadings in this case may be briefly considered.

Plaintiff filed an action to recover a mere unsecured money demand, in the sum of $1,500. To this defendant interposed, by way of defense, a counter-claim, praying an *accounting* from plaintiff, based upon the occupancy by him of certain real estate in the capacity (as claimed by defendant), of a mortgagee in possession; as well, also, praying the right to *redeem* said real estate from plaintiff.

Under this state of pleadings, in which is well illustrated a most complete confusion and intermingling of legal and equitable remedies, the cause was tried by the court, sitting without a jury, (the record being silent as to any *express* waiver of trial by jury,) resulting in judgment against plain-

tiff for the recovery by defendant, as owner, of a large and valuable tract of real estate, with valuable personal property and stock thereon, and a money judgment against plaintiff, in the sum of $17,173.50.

The court arrived at the amount of said money judgment not by any actual accounting or opportunity afforded in that behalf, but based it upon a mere informal statement, not under oath, not made in court, but secured from plaintiff by a supposed purchaser. The figures given in that statement were manifestly but mere approximations, tending to support the price asked by the owner for the property. Those figures the court accepted as final, and stated an account based *exclusively* thereon.

II.

As above shown, the money matters between plaintiff and the Cattle Company were adjusted and settled by the agreement entered into September 12, 1894, and which agreement, as has already been pointed out, was signed in the name of the Cattle Company by defendant Sherman, as its president.

Under that agreement, plaintiff was to be put in possession of *all* of the property of the company, not as mortgagee in possession, but as absolute owner. In addition, the Cattle Company covenanted to transfer and convey said property to him, by proper deeds of conveyance, within the period of thirty days thereafter; and, further, that all stock cattle sold from the range subsequent to September 1, 1894, should be accounted for to plaintiff. In consideration of the performance by the Cattle Company of all and singular said covenants and undertakings, plaintiff agreed to surrender, cancel, and discharge the two certain promissory notes and mortgage, hereinabove referred to.

The agreement expressed, in clear and unmistakable terms, the exact settlement between the parties, and the precise terms thereof, as well, also, the exact character, as *ab-*

solute owner, in which plaintiff was to be placed in possession of the property. The only things required to be done and performed by plaintiff consisted in the surrender, cancellation and discharge of the two notes and mortgage; but that performance was conditioned upon *prior* performance by the Cattle Company, as above stated.

Thus, the duties and obligations of the respective parties to the agreement, as well the exact order of such performance, were fixed in precise and certain terms.

In performance of that agreement, the Cattle Company placed plaintiff in possession of the property; it executed to him a bill of sale covering certain personal property known as Desert Wells, and not embraced in the original mortgage; it did not formally transfer to him, by deed of conveyance, the real estate, nor the cattle, farming implements, etc., described in the agreement of September 12, 1894, under which alone plaintiff took possession; and it failed to account to him for 104 head of cattle, which latter it appeared had been sold from the range subsequent to September 1, 1894, in violation of said agreement, and for which, under the terms thereof, said Cattle Company had covenanted to account. Plaintiff estimated that said cattle were of the value of $1,500; and it was for that sum, and growing out of the facts just stated, that he brought suit.

It may, perhaps, be suggested that this item of claim might have been made the subject of suit by plaintiff against the Cattle Company, for breach of its contract, to the extent above mentioned. It is evident, however, that plaintiff proceeded upon the theory that, under said agreement, he was entitled to a full and complete performance of all things agreed to be done by the Cattle Company, before it became incumbent upon him to surrender and cancel the notes; and that said notes had been satisfied and discharged to the extent that the Cattle Company had performed its agreement; but that to the extent the agreement had not been performed, namely, $1,500, (the estimated value of said 104 head of

cattle,) the indebtedness due plaintiff had not been discharged. Thus it was that plaintiff brought suit to recover, not the principal or interest of the notes, or either of them, but simply the sum of $1,500, upon the theory that that amount was due as an unpaid and *unsecured balance* growing out of the above transaction.

That in so suing, plaintiff had no intention of disavowing, abandoning, or rescinding the agreement of settlement, so far as he was concerned, and that his suit did not have such effect, in law, is perfectly manifest from the pleading, in which he expressly avers that the only amount sued for is a "balance due" of $1,500, and that the payment thereof "*is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property*" (*R.*, *4*).

Hence, not only was there no abandonment or rescission of the agreement by plaintiff; but, on the contrary, by his pleading, he effectually made it impossible to thereafter assert that the note, or said balance claimed thereunder, was any part of a secured obligation, or that the mortgage, originally given to secure the note, was then in *legal* existence.

Attention is again particularly asked to the exact situation of the parties and the subject-matter embraced in the litigation. By the arrangement referred to, plaintiff went into possession of the property as *absolute owner*, in September, 1894; and, because of his inability to secure an accounting to the extent of the value of the cattle, as above, he filed suit, in November, 1894. There the matter rested, (presumably because of the absence of defendants from the jurisdiction of the court,) for a period of upwards of five years; during all of which time, plaintiff was permitted to remain in complete and undisputed ownership of the property, exercising all the rights incident to such full ownership.

Subsequently, and in May, 1899, when defendant Sherman was served with process, he appeared in the action, and, for the first time, asserted that plaintiff's possession of

the property was *not* that of owner, but that merely of a *mortgagee in possession;* and this too despite the agreement of settlement, of September, 1894, which defendant, in his said counter-claim, expressly admitted had been entered into, and which, as shown, had been acted on by all parties for upwards of five years.

The only possible theory under which defendant could have prevailed, (even assuming that the practice of the Territory permitted such unusual counter-claim of a purely equitable nature in a suit based on a mere legal demand to recover a sum certain, but which practice is not here admitted,) is, that *no* such agreement had been effected or made—a theory utterly at variance with the pleadings, as well absolutely impossible thereunder.

As has been shown, the agreement contained certain distinct promises, *each* to be performed by the Cattle Company *before* the notes and mortgage were required to be canceled and discharged by plaintiff.

The counter-claim nowhere asserts such performance, or even a tender of performance, by the Cattle Company; and it was, therefore, a manifest error to assume a breach or rescission of contract, on the part of plaintiff, simply because of his alleged failure to cancel and surrender the notes and discharge the mortgage. That obligation was not upon him until full performance by the Cattle Company, or a proper tender thereof. Placing Ward in possession of a part of the property was only *part* performance; and, until he was placed in possession of *all* the property, and transfer and conveyance thereof made to him by appropriate deeds of conveyance, he was under no obligation to cancel the notes and discharge the mortgage. Plaintiff did not sue under the mortgage, but by his complaint effectually estopped and precluded himself from thereafter asserting any rights or claim thereunder; and it is plain that a judgment against plaintiff, founded on such answer and counter-claim, upon

the theory that no such agreement had been made or existed, was erroneous.

That the law was incorrectly applied by the courts below in this case is abundantly established by the authorities.

Take, for example, the following:

"If the contract in plain and unambiguous language makes the observance of an apparently immaterial requirement the condition of a valid contract, neither courts nor juries have the right to disregard it or to construct, by implication or otherwise, a new contract in the place of that deliberately made by the parties" (*vol. 7, A. & E. Enc. L., 2d ed., p. 118, and cases cited in note 1*).

"Where the performance of one's duties by the terms of the contract is made a condition precedent, either expressly or by implication, he can only recover by pleading and proving that he has faithfully discharged those duties or that the other party has waived the performance of them" (*id., p. 145, and cases cited in note 8*).

"Whether made a condition precedent or not, it demands as a prerequisite to a recovery that the complainant show either a tender of performance, or a readiness or willingness to perform, or that this willingness was rendered ineffectual by conduct of the other party which makes compliance either unnecessary or impossible" (*id., pp. 146–147, and cases cited in notes 1, 2, and 3*).

This doctrine of the law will be found recognized and followed in cases innumerable; and it has been thoroughly settled by the decision of this court, in the case of Jones *vs.* United States (*96 U. S., 24*), from the opinion in which, the following is quoted:

"Where an act is to be performed by the plaintiff before the accruing of the defendant's liability under his contract, the plaintiff must prove either his performance of such condition precedent, or an offer to perform it which the defendant rejected, or his readiness to fulfill the condition until the defendant discharged him from so doing, or prevented the execution of the matter which the contract required him to perform. For, where the right to demand the performance of a certain act depends on the execution by the promisee

of a condition precedent or prior act, it is clear that the readiness and offer of the latter to fulfill the condition, and the hindrance of its performance by the promisor, are in law equivalent to the completion of the condition precedent, and will render the promisor liable upon his contract (Graves *vs.* Legg, 9 Exch., 709; Morton *vs.* Lamb, 7 Term, 125; 2 Wms. Saund., 352*b*; 2 Smith, Lead. Cas., 13).

"Well-considered authorities everywhere agree that a contract may be so framed that the promises upon one side may be dependent upon the promises upon the other; so that no action can be maintained, founded on the written contract, without showing that the plaintiff has performed, or at least has been ready, if allowed by the other party, to perform, his own stipulations, which are a condition precedent to his right of action: * * *

"Additional authorities to show that a party bound to perform a condition precedent cannot sue on the contract without proof that he has performed that condition, is scarcely necessary, as the principle has become elementary (Governeur *vs.* Tillotson, 3 Edw. (N. Y.) Ch., 348)."

Under the terms of the agreement of September 12, 1894, it was stipulated that the conveyance by deed and delivery of *all* the property should be made or tendered within thirty days, to wit, October 12, 1894. Suit was not brought by Ward until November 28, 1894. *Time* was an express condition of the contract. This important point is entirely ignored by the trial court, and its sixth finding (*R., 28*) that Ward failed to cancel the notes or satisfy the mortgage, is in direct conflict with the necessary legal result of the pleadings on which the case was tried.

It cannot be said that five years subsequent to the surrender of possession, the company (or its assumed assignee Sherman), can take advantage of its own breach of the agreement, and claim that plaintiff took possession under the mortgage as a trustee for the mortgagor or his assigns. That view would simply make the primary breach of contract by the Cattle Company and Sherman a ground for re-

storing to them the property under a new theory devised five years after the contract, and after their breach thereof.

All authorities agree that the right to claim a rescission is only to be exercised, if at all, within a *reasonable* time, and that a party to an agreement will not be permitted to wait an unreasonable or unconscionable time to assert such rescission, when to so hold would be to work irreparable injury and loss to the other party to the agreement.

It may be stated generally that unreasonable and inexcusable delay, on the part of one seeking rescission of a contract, will be deemed a waiver thereof:

Cummins *vs.* Lods (1 McCrary, 338);
Grymes *vs.* Sanders (93 U. S., 55).

In the latter case, this court, speaking of the question of delay, as affecting the right to relief, adds:

"He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted."

The English rule of decision, touching the same question, is thus stated, in the case of Petroleum Co. *vs.* Hurd (*L. R., 5 P. C., 221*):

"When it would be practically unjust to give a remedy either because a party has by his conduct done what might fairly be considered a waiver of it, or where by his conduct or neglect he has, though not perhaps waiving the remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy would afterwards be asserted in either of these cases, lapse of time and delay are most material."

The *rescission* of a contract is a remedy to be applied in the sound discretion of the court, and only he is entitled to it who can show that he is without fault, or that the other party is derelict. (*Thomas vs. McCue, 53 Pac. Rep., 161.*)

Under the facts in this case, it would be most unreasonable to permit defendant Sherman, at such late date, to assert for the first time, an alleged abandonment or rescission of the original agreement by Ward, simply and only because of the fact that plaintiff instituted suit to recover a sum that he conceived to be due him under and as a part of the agreement itself,—the theory of abandonment having come into being upwards of five years after the contract, and apparently to meet the exigencies of this suit.

III.

From the foregoing, it necessarily results that the conclusion by the court below "that the plaintiff held said property as a trustee for the benefit of defendant Sherman and that he is accountable for the property by him sold while in possession, to said defendant Sherman" (*R., 29*), cannot be sustained by the pleadings; and, moreover, is not supported by any legal evidence.

The statement of the trial court that Ward was a mortgagee in possession is erroneously styled a "finding." *Contra* it was and could be only a legal conclusion drawn from assumed facts which in truth have no existence in this record.

But even if treated as a finding of an *ultimate* fact, it is wholly inconsistent with the pleadings; is absolutely unsupported by legal evidence; and is, as matter of law, erroneous.

In making this statement, counsel are not unmindful of the rule of decision many times asserted by this court as, for example, in the case of Young *vs.* Amy, (*171 U. S., 179,*) that, on an appeal from the judgment of the territorial courts, the findings of fact are conclusive upon this court.

That general doctrine, however, is subject to a well-defined limitation, which is here applicable, namely, that where such court has certified to this court, along with its findings,

the evidence on which a fact essential to the judgment rendered was found, and from which evidence it appears that there was *no* legal evidence to establish such fact, this court will reverse the judgment.

The practice regulating appeals from the territorial courts is similar to that in respect of appeals from the Court of Claims; in each of which it is contemplated that only the ultimate facts, and conclusions based thereon, shall be certified as the record on appeal.

In the present case, the court has before it the entire record, consisting of the pleadings, exhibits, testimony, findings, conclusions, and judgment.

In the case of United States *vs.* Clark, (*96 U. S., 37,*) on appeal from the Court of Claims, the latter court found, among others, a fact essential to support the judgment rendered. In certifying its findings of fact, said court likewise sent up the entire record. From an inspection of the latter, it conclusively appeared that there was *no* legal evidence before the Court of Claims upon which said ultimate fact could have been found.

This court there sustained its right to look at the record, and to determine therefrom that it contained *no* legal evidence to support the finding. In the opinion, this right is thus stated:

"We are of opinion that when that court has presented, as part of their findings, what they show to be all the testimony on which they base one of the essential, ultimate facts, which they have also found, and on which their judgment rests, we must, if that testimony is not competent evidence of that fact, reverse the judgment for that reason. For here is, in the very findings of the court, made to support its judgment, the evidence that in law that judgment is wrong. And this not on the weight or balance of testimony, nor on any partial view of whether a particular piece of testimony is admissible, but whether, upon the whole of the testimony as presented by the court itself, there is any evidence to support its verdict; that is, its finding of the ultimate fact in question."

See, also, Moore *vs.* United States (*91 U. S., 270*).

Applying the doctrine of that case to the case at bar, it establishes the right of this court to determine that there was *no* legal evidence upon which the court could base its finding or conclusion, above referred to, by which it undertook to convert the possession of Ward as *owner* into that of a mere trustee or mortgagee in possession. Not only was there *no* legal evidence justifying such conclusion, but the uncontroverted evidence established exactly the reverse. It is not necessary that the court should weigh the testimony in order to so determine; nor is it necessary to even open the testimony, since it will be found admitted in the pleadings and accompanying exhibits.

This matter being properly determined, the result necessarily follows that the judgment based upon such finding or conclusion was erroneous.

IV.

In conclusion, it is proper to refer briefly to the summary manner in which the court below disposed of this case, resulting in sacrificing the rights and property of plaintiff, amounting to many thousands of dollars.

The decision of the court below, and its statement of facts, comments on the failure of counsel for appellant to specify, under errors "A" and "B," what evidence was admitted or rejected, (*R. 88, 99;*) *but* assignments "C," "D," "E" and "F" averred that the evidence does not sustain the findings and judgment, and that the judgment of the trial court is contrary to the evidence and to law (*R. 99*).

And here be it remembered that this case was tried by the court, sitting without a jury, and all the evidence was transcribed and certified as part of the record, in the court below; an entirely different situation from that of an ordinary review under bills of exception.

This is a matter of express statutory direction. The legis-

lature of the Territory passed an act March 18, 1897, No. 71, providing as follows:

"SEC. 1. Whenever an appeal or writ of error is taken from any district or circuit court of this Territory to the supreme court of the Territory the appellant or plaintiff in error, as the case may be, may have the testimony taken in the case transcribed and certified by the court reporter and file the same with the papers in the case, and thereupon it shall become and be a part of the record in such case."

This section was quoted and applied in the case of Apache County *vs.* Barth (*177 U. S., 538, 541*).

It was, hence, the duty of the supreme court of the Territory to consider the testimony and give full effect thereto as "a part of the record in such case."

The facts absolutely essential to the judgment rendered were not only *not* supported by the evidence (as has been above shown), but said entire evidence (not merely the *weight* thereof), including the admission of defendant in his answer and counter-claim, established the *exact opposite* thereof.

Hence, the assignments in this regard, in a case tried by the court, sitting without a jury, were quite as definite, certain and specific as the nature of the case admitted; and clearly entitled appellant to the review of the entire record. To hold otherwise, would simply result in a denial of justice by the application of technical requirements.

It is not necessary to here follow the criticisms of the court below, or of counsel for appellees, in their printed brief in this court, touching the matter of alleged failure to comply with mere rules of practice, etc.; it is sufficient to state that the errors complained of were fairly presented to the court below for its review; and, furthermore, notwithstanding said court, in its opinion, comments on the failure of appellant to sufficiently assign and specify error, and, apparently, disposed of the appeal in a summary manner; it did not

dismiss the appeal because of such imperfections, but *affirmed* the judgment below, as follows:

"And no error appearing upon the face of the record, the judgment of the court below is affirmed" (*R., 100*).

Manifestly if the judgment of the court below was erroneous, as matter of law, upon a review of the entire record, it was the duty of the supreme court of the Territory to review the record and so decide (Apache Co. *vs.* Barth, *177 U. S., 538*).

Appeals from the territorial courts are intended to further the ends of justice, and even in its many decisions pointing out imperfections in records from such courts, it is evident that this court has always carefully protected substantial rights of appellants, in order to prevent injustice or miscarriage of justice, simply because of the application of technical requirements (Salina Stock Co. *vs.* Salina Creek Co., *163 U. S., 109, 118*).

The pleadings and accompanying exhibits show manifest error in the judgment, even without resort to the evidence. But if, for any reason, the court shall be of opinion that there is no sufficient statement of facts, it is earnestly urged that the property and rights of appellant should not be permitted to be sacrificed,—the ends of justice would be better met by remanding the case for a further statement of facts.

It is respectfully submitted, however, that under the present record, manifest error does appear; and that the judgment should be reversed.

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